

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD NEWELL,

Petitioner,

v.

JUDY P. SMITH, Warden,  
Oshkosh Correctional Institution,

Respondent.  
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OPINION AND ORDER

12-cv-432-bbc

Donald Newell, an inmate at the Oshkosh Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and he has paid the \$5 filing fee. On preliminary review under Rule 4 of the Rules Governing Section 2254 Proceedings in the United States District Courts, I determined that only one of the 24 claims raised in the petition was exhausted and not subject to dismissal by the doctrine of procedural default, which prohibits the courts from reviewing claims that a petitioner has not given the state courts an opportunity to consider and can no longer raise in state court. After I gave petitioner thirty days to show whether his claims fit within an exception to the procedural bar, he filed multiple supplements to his petition.

Having considered the supplements provided by petitioner, I will direct the state to respond to his claim concerning the sufficiency of the evidence to corroborate his confession (claim 3) and dismiss his remaining claims as procedurally barred (claims 1-2 and 4-24).

The following background facts are drawn from petitioner's submissions, including the decision issued in connection with petitioner's direct appeal as well as orders from the trial court and the court of appeals on his subsequent motions for post conviction relief.

## BACKGROUND

Petitioner is challenging his August 2, 2007 state court conviction on ten counts of second degree sexual assault for having intercourse with a person suffering a mental deficiency. A jury in the Circuit Court for Chippewa County found petitioner guilty as charged in that case (No. 2006CF122) after considering petitioner's written confession, in which he admitted having anal intercourse with the victim ten to twelve times, and testimony from the victim, who suffers from a number of physical and mental disabilities. On October 16, 2007, the court imposed a term of 21 years on each count, consisting of six years' initial confinement followed by 15 years' extended supervision, with the terms to run concurrently. On September 25, 2008, the circuit court increased the term of initial confinement to eight years.

On direct appeal, petitioner argued that his confession was not corroborated sufficiently to support a conviction on ten counts of sexual assault. The court of appeals rejected this argument and affirmed the conviction on May 11, 2010. State v. Newell, 2010 WI App 84, 326 Wis. 2d 264, 787 N.W.2d 59, 2010 WL 1851344 (unpublished). The Wisconsin Supreme Court denied petitioner's petition for review on September 21, 2010.

On November 15, 2010, petitioner filed an application for a writ of habeas corpus under 28 U.S.C. § 2254 in this court. In that pleading, petitioner raised 25 grounds for relief. Because it appeared that only one of those grounds (the corroboration claim) had been exhausted at the

state court level, petitioner was given a choice of proceeding with his sole exhausted claim or dismissing the petition in its entirety and refiling it after he had exhausted all of his claims. Order, dkt. #8. Petitioner responded that he wished to dismiss his petition and return to state court. Id., dkt. #9. He was reminded to “act diligently to insure that his federal habeas clock does not expire” and the petition was dismissed without prejudice on January 12, 2011 for petitioner’s failure to exhaust all available state court remedies. Id., dkt. #10.

Petitioner filed a motion in the state circuit court on February 16, 2011, asserting 25 claims. The circuit court construed the submission as a motion for post conviction relief under Wis. Stat. § 974.06 and found that petitioner’s claims were procedurally barred. Petitioner did not appeal. On April 5, 2011 petitioner filed a second motion in the circuit court under Wis. Stat. § 974.06, repeating all 25 claims. The circuit court denied that motion on April 29, 2011, concluding that the claims “remained procedurally barred” and, alternatively, the claims had “no appellate merit on their face[.]” The court of appeals agreed that petitioner’s arguments “have either already been litigated or are procedurally barred” and affirmed the circuit court’s order in an unpublished opinion. State v. Newell, 2012 WI App ¶ 4, 2012 WL 1673627 (May 15, 2012). In that same opinion, the court of appeals concluded that the appeal was “frivolous” and imposed sanctions against petitioner for engaging in “repetitively litigating the same matters in his postconviction motions.” Id. at ¶ 7. Petitioner did not appeal further by filing a petition for review with the Wisconsin Supreme Court.

On June 20, 2012, petitioner filed his second application for a writ of habeas corpus in this court, alleging that he is entitled to relief on the following grounds: (1) the victim was competent to engage in relations; (2) petitioner lacked intent to harm the victim; (3) the

evidence was insufficient to corroborate petitioner's confession; (4) trial counsel was ineffective; (5) petitioner was denied witnesses; (6) petitioner was denied evidence; (7) the trial judge was biased toward people with disabilities; (8) petitioner was tricked into incriminating himself; (9) petitioner's sentence is too harsh because he did not commit an act of violence; (10) he was not allowed to cross-examine the prosecution's expert psychologist, who gave testimony that was both unreliable and biased; (11) the jury, which consisted of eleven women and one man, was not impartial; (12) the "totality of the circumstances" resulted in a denial of "constitutional protections" and a "very suspect conviction"; (13) IQ tests failed to prove that the victim was incompetent or mentally disabled; (14) testimony from the prosecution's "paid expert witness" lacked credibility; (15) both petitioner and the victim were punished for filing a criminal complaint against a public official; (16) the charges against petitioner are unjust and constitute "malicious prosecution"; (17) the jury was prejudiced against the idea of a person in a wheelchair falling in love; (18) the trial judge "should have recused himself" from the proceedings; (19) the trial court "only allowed one biased interpretation about mental illness"; (20) petitioner's punishment was increased improperly on resentencing and his counsel did not object; (21) the government ignored petitioner's criminal complaint against a public official; (22) public officials "harassed, threatened, and intimidated" petitioner's witnesses; (23) the state did not present "any evidence" that the victim was incompetent during their "mutual affair"; and (24) the victim suffered mental abuse and "brainwashing by another party."

Petitioner concedes that only one of his grounds of relief (claim 3, concerning the corroboration of his confession) was raised properly before the Wisconsin Supreme Court, which denied review on direct appeal. The court of appeals addressed his corroboration claim on the

merits and petitioner sought review by the state supreme court. Therefore, petitioner's corroboration claim (claim 3) has been exhausted.

The remaining 23 claims in the pending petition (claims 1-2 and 4-24) were reportedly raised in the post conviction motion petitioner brought under Wis. Stat. § 974.06. To the extent that these claims were raised at all, the last state court to consider them, the court of appeals, found that they were procedurally barred. State v. Newell, 2012 WI App ¶ 4, 2012 WL 1673627 (May 15, 2012). Petitioner did not file a petition for review from that decision in the Wisconsin Supreme Court, so these claims are unexhausted and subject to dismissal as procedurally barred from federal habeas review for reasons outlined further below.

## OPINION

### A. Claims 1-2 and 4-24: The Doctrine of Procedural Default

As I explained to petitioner previously, before a federal court may consider the merits of a state habeas petitioner's claims, the petitioner must exhaust the remedies available to him in the state courts. 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). When the petitioner has already pursued his state court remedies but failed to properly present his claims to the state courts along the way, "it is not the exhaustion doctrine that stands in the path to habeas relief . . . but rather the separate but related doctrine of procedural default." Perruquet, 390 F.3d at 514. The procedural default doctrine requires that state prisoners "not only become ineligible for state relief before raising their claims in federal court, but also that they give state courts a sufficient opportunity to decide those claims before doing so." O'Sullivan, 526 U.S. at 854 (Stevens, J.,

dissenting). Under the procedural default doctrine, a federal court is not allowed to reach the merits of a habeas claim if the petitioner either 1) failed to raise his claim in the state courts and it is clear that those courts would now hold the claim procedurally barred or 2) presented his claim to the state courts but the state court dismissed the claim on a state procedural ground independent of the federal question and adequate to support the judgment. Perruquet, 390 F.3d at 514 ; Moore v. Bryant, 295 F.3d 771, 774 (7th Cir. 2002); Chambers v. McCaughtry, 264 F.3d 732, 737-38 (7th Cir. 2001).

Petitioner has exhausted his state court remedies only with respect to the corroboration claim in claim 3. As for his remaining claims (1-2 and 4-24), the last court to consider them concluded that they were procedurally barred under Wis. Stat. § 974.06(4). Both this statute and the state supreme court's holding in State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), bar successive motions and appeals unless the defendant can show a sufficient reason for his failure to raise the issues previously. State v. Newell, 2012 WI App ¶ 4. It is clear that the state court relied on adequate and independent state law grounds to dismiss petitioner's remaining claims. Perry v. McCaughtry, 308 F.3d 682, 690-91 (7th Cir. 2002). Under these circumstances, it is safe to conclude that there are no avenues of relief available for petitioner to pursue his remaining claims and that he has procedurally defaulted these claims for purposes of federal review. Id. at 692.

Where a petitioner has procedurally defaulted a claim in state court, federal habeas corpus review is available only if he can demonstrate either that he can show (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law" or that he can establish that (2) "failure to consider the claims will result in a fundamental miscarriage of

justice.” Coleman v. Thompson, 501 U.S. 722, 750 (1991); Steward v. Gilmore, 80 F.3d 1205, 1211-12 (7th Cir. 1996). Cause to overcome a procedural default requires a showing “that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” Coleman, 501 U.S. at 753 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). To show prejudice, a petitioner must present evidence that the errors at trial “worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Perruquet, 390 F.3d at 515 (quoting United States v. Frady, 456 U.S. 152 (1982) (emphasis omitted)). The fundamental-miscarriage-of-justice exception requires a showing “that a constitutional violation has ‘probably resulted’ in the conviction of one who is ‘actually innocent’ of the substantive offense.” Dretke v. Haley, 541 U.S. 386, 393 (2004) (quotation omitted).

Because procedural default is an affirmative defense, petitioner was not required to show cause and prejudice or actual innocence in his petition. Perruquet, 390 F.3d at 515. Nevertheless, a court may raise an affirmative defense before requiring the state to answer if “it is so plain from the language of the complaint and other documents in the court’s files that it renders the suit frivolous.” Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002) (“Under the circumstances there was no point to serving the defendants with process, forcing them to engage counsel, and then waiting for the inevitable motion to dismiss.”).

After I concluded that a motion to dismiss the defaulted claims (claims 1-2 and 4-24) as procedurally barred would be “inevitable” in this case, I allowed petitioner an opportunity to overcome his default by supplementing his petition to explain (1) what cause he may have for his failure to properly present his defaulted claims (grounds 1-2 and 4-24) to the trial court in

the first place and his failure to raise these claims on appeal or in a motion for post conviction relief before raising them on appeal; and (2) what prejudice he suffered as a result of his failure to raise these claims properly; or (3) whether he is actually innocent of the crime for which he is imprisoned.

Petitioner contends that his default should be excused because he received inadequate assistance from “the State of Wisconsin courts, Appellate system, State Public Defender’s Office, and the Legal Aid for Incarcerated Prisoners (L.A.I.P.) (from the University of Wisconsin Law School).” Liberally construed, petitioner blames his failure to properly present his defaulted claims on inadequate legal advice and his status as a pro se litigant.

The Court of Appeals for the Seventh Circuit has specifically rejected the argument that a petitioner’s pro se status alone constitutes cause that would excuse a procedural default. Smith v. McKee, 598 F.3d 374, 385 (7th Cir. 2010); Harris v. McAdory, 334 F.3d 665, 668 (7th Cir. 2003); Barksdale v. Lane, 957 F.2d 379, 385-86 (7th Cir. 1992). Therefore, I will consider whether petitioner was prevented from raising his claims in a proper way because he was denied effective assistance of counsel.

To the extent that petitioner blames his default on inadequate legal advice, ineffective assistance of counsel may constitute cause for the procedural default. Murray v. Carrier, 477 U.S. 478, 488-89 (1986). “Not just any deficiency in counsel’s performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution.” Edwards v. Carpenter, 529 U.S. 446, 451 (2000). “In other words, ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is *itself* an independent constitutional claim.” Id. (emphasis in original).



In the state court, petitioner did not raise an independent claim for ineffective assistance of counsel concerning his attorney's failure to raise his defaulted claims. His federal petition does not include an independent ineffective assistance claim alleging deficient performance by counsel on appellate or post conviction review. Under these circumstances, petitioner cannot rely on an ineffective assistance claim to show cause for his procedural default. Carpenter, 529 U.S. at 452. Absent a showing of cause, the grounds for relief set out in claims 1-2 and 4-24 are procedurally barred and I need not inquire further by examining the issue of prejudice. McCleskey v. Zant, 499 U.S. 467, 502 (1991); Promotor v. Pollard, 628 F.3d 878, 887 (7th Cir. 2010). Because petitioner does not attempt to show that he is actually innocent, Schlup v. Delo, 513 U.S. 298, 326-27 (1995), I need not consider this exception either. Accordingly, claims 1-2 and 4-24 will be dismissed as barred by the doctrine of procedural default.

B. Claim 3: Insufficient Evidence to Corroborate the Confession

Petitioner's only remaining ground for relief (claim 3) concerns his argument that the evidence was insufficient to corroborate his confession. This claim was rejected on direct appeal in an unpublished opinion. State v. Newell, 2010 WI App 84, 326 Wis. 2d 264, 787 N.W.2d 59, 2010 WL 1851344 (May 11, 2010). On federal habeas corpus review, a petitioner may establish a violation of due process on a claim of insufficient evidence only when, viewing the evidence in a light most favorable to the prosecution, no rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). To prevail, petitioner must show that the state court's decision was contrary to the Jackson standard or that it involved an unreasonable application of that standard. 28

U.S.C. § 2254(d)(1). Although petitioner's allegation of insufficient evidence is not well developed, I will give petitioner the benefit of the doubt and order the state to respond to this claim.

## ORDER

IT IS ORDERED that

1. The grounds for relief presented by petitioner Donald A. Newell in claims 1-2 and 4-24 are DISMISSED as barred by the doctrine of procedural default.

2. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on Warden Smith.

3. Within 30 days of the date of service of this order, respondent must file an answer to petitioner Donald A. Newell's claim that the evidence adduced at trial was insufficient to corroborate his confession (claim 3).

The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue.

4. **Dispositive motions.** If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default, it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve his responsive brief and any supporting documents. The state shall have

10 days following service of the response within which to file a reply.

If the court denies the motion to dismiss in whole or in part, it will set a deadline within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

**5. When no dispositive motion is filed.** If respondent does not file a dispositive motion, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of respondent's answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's adjudication of the claim:
  1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,
  2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.
- Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.

**6.** For the time being, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who

appears on the state's behalf. The court will not consider any submission that has not been served upon the state. Petitioner should note on each of his submissions whether he has served a copy of that document upon the state.

Entered this 11th day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge